

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1084

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1084

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAFAEL CUADROS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ALLEN R. BENTLEY,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

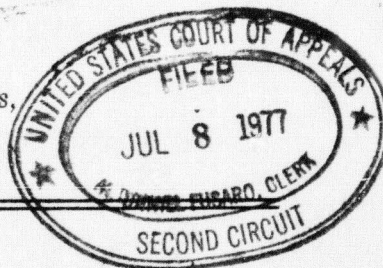




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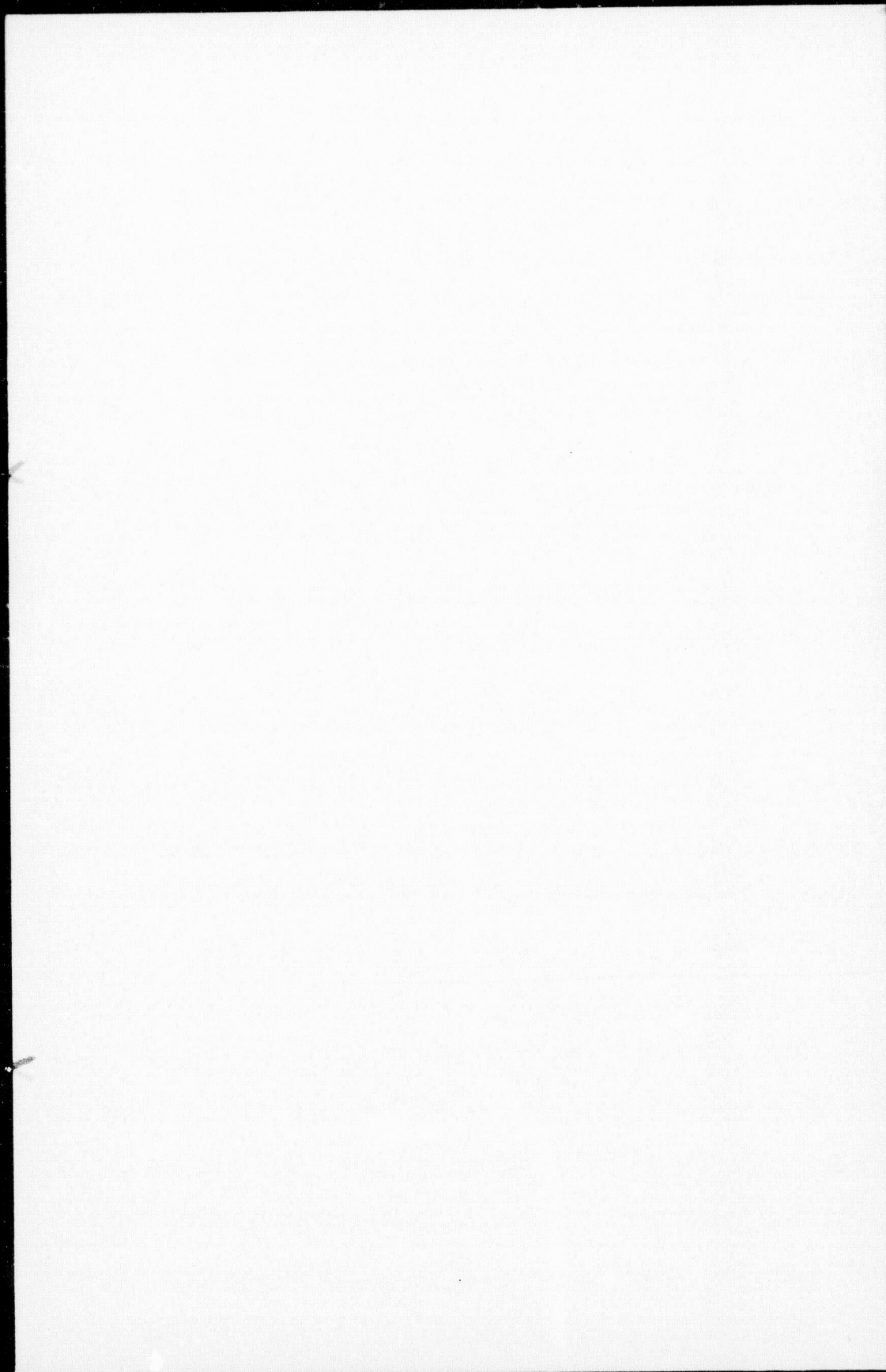
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**United States Court of Appeals
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Docket No. 77-1084

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAFAEL CUADROS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Rafael Cuadros appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 20, 1977, after a six-day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Superseding Indictment S 75 Cr. 1254, filed on August 26, 1976, charged Cuadros, Jaime Valdes and Louis Prikas, in Count One, with conspiring to violate the Federal narcotics laws, in violation of Title 21, United States Code, Section 846. Count Two charged Cuadros, Valdes and Prikas with distributing, and possessing with intent to distribute, approximately one pound of cocaine on December 16, 1975, in violation of Title 21, United

States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.*

Trial commenced on December 6, 1976 and ended on December 13, 1976 when the jury found Cuadros not guilty on Count One and guilty on Count Two. On January 20, 1977, Judge Cooper sentenced Cuadros to incarceration for a period of four years, to be followed by three years of special parole. Cuadros is now serving his sentence.

Statement of Facts

A. Synopsis

On December 16, 1975, Rafael Cuadros and Jaime Valdes were arrested in Valdes' car on East 74th Street near First Avenue and one pound of cocaine was found in the footwell on the passenger side of the car, where Cuadros had been seated, shortly after Valdes and Louis Prikas had unsuccessfully attempted to sell the cocaine to a Government informant for \$18,000. Prikas testified that during the weeks preceding the sale Valdes had stated, outside of Cuadros' presence, that Cuadros was the supplier of the cocaine. Prikas also testified that on the evening of the sale, in Cuadros' presence, Valdes told him that Cuadros was present to provide

* The original indictment filed on December 23, 1975 under Docket No. 75 Cr. 1254 named only Cuadros and Valdes as defendants. The superseding indictment added Prikas as a defendant.

Prikas entered a plea of guilty to Count One of the indictment on October 20, 1976. On February 17, 1977, Prikas was sentenced to the custody of the Attorney General for a period of two years; execution of sentence was suspended and Prikas was placed on probation for a period of six months.

Valdes jumped bail shortly after his release from custody on December 30, 1975 and reportedly is living in Colombia.

"protection," to which Cuadros expressed no dissent. Cuadros denied playing any part in the offense. Cuadros and his wife testified that he had gone to see Valdes in Queens on December 16, 1975 to give Valdes Christmas cards and two watches, which Valdes was going to take to Colombia, and had accompanied Valdes to Manhattan to discuss a legitimate business venture.

B. Government's Case

The Government called Louis Prikas. Prikas was self-employed at a hardware business which he owned with his brother. (Tr. 17-18).^{*} At the time of the offense, however, Prikas was employed as a tool and die-maker at the Bulova Watch Company. (Tr. 25). During his eight years of employment at Bulova, Prikas became a good friend of Jaime Valdes, who worked at Bulova as a toolmaker. (Tr. 25-27). Through Valdes, Prikas made the casual acquaintance of Rafael Cuadros, Valdes' brother-in-law. (Tr. 25).

On November 7, 1975, the Bulova toolmakers held their annual dinner at the Club Safari, in College Point, Queens. (Tr. 27-28). At the dinner, Valdes, in a state of depression, approached Prikas. Valdes, crying, told Prikas his wife had left him, taken their two children, filed separation papers and returned to Colombia. (Tr. 30). Valdes said he desperately needed to raise money for a trip to Colombia, in which he hoped to effect a reconciliation with his wife. (Tr. 30). Valdes told Prikas he had "something to sell" and urged Prikas to help him sell "the stuff" by obtaining the phone number of Bob Lubash (Tr. 30-31), a stockbroker whom Prikas had

^{*} Subsequent references to the trial transcript, Government exhibits and appellant's brief will be abbreviated as "Tr.", "GX" and "Br.", respectively.

once mentioned to Valdes as being a reputed drug dealer. (Tr. 32). Prikas agreed to do so. (Tr. 33).

Prikas obtained Lubash's number from a friend, Al Siefert. (Tr. 34). A day or two later, Prikas told Valdes that he had the number. Valdes said he would have to get a sample of the cocaine from Rafael Cuadros, his brother-in-law, to show Lubash. (Tr. 35-36, 94). In late November, 1975, Valdes told Prikas that he had gotten the sample to show Lubash and stated that he, his brother-in-law Rafael, and Prikas would each make \$2,000 on the impending deal. (Tr. 37-38).

Prikas called Lubash and made an appointment to show the sample to him. (Tr. 39). On December 8, 1975, Prikas and Valdes drove in Prikas' car to Lubash's apartment at 300 East 74th Street in Manhattan and showed Lubash the sample. (Tr. 40-44). Lubash first examined the sample by smelling and touching it. (Tr. 45). Then he tested the cocaine by putting it into indentations on a marble tray and adding various chemicals to it. (Tr. 45-46, 64). Lubash expressed interest in purchasing the pound that Valdes said was available. (Tr. 46-47). Before committing himself, however, Lubash said that he wanted to see "another cut" to make certain that the quality was consistently high. Valdes and Prikas agreed to bring Lubash a second sample. (Tr. 46).

Shortly thereafter, at Bulova, Valdes told Prikas that Cuadros had complained about Lubash's request for a second sample. Valdes told Prikas that he had tried to explain to Cuadros that Lubash needed the additional sample in order to compare the chemical reactions, and thereby double-check the quality. (Tr. 47-48). Several days later, Valdes told Prikas that he had received an additional quantity of cocaine that could be shown to Lubash. (Tr. 48-49). On December 16, 1975, Prikas

called Lubash several times. Lubash seemed to be "stalling for the money." (Tr. 50). Eventually, a meeting with Lubash was arranged for 8:30 p.m. that day. (Tr. 55; GX 4). After the meeting was arranged, Prikas called Valdes and told him that Lubash had the money. The men agreed to meet at 48th Street and Queens Boulevard, in Queens, where they planned to leave one of their cars and drive together in the other to Lubash's apartment. (Tr. 56-57).

Prikas arrived first at 48th Street and Queens Boulevard. He parked and waited. (Tr. 58). Valdes arrived and pulled up beside Prikas' vehicle. (Tr. 58). Cuadros was riding on the right-hand, or passenger, side of Valdes' car. (Tr. 60). The right-hand window of Valdes' car was rolled down. (Tr. 59). Prikas rolled down his window and asked Valdes, "What is he doing here?" Valdes replied that Cuadros was present "for protection." (Tr. 58). Cuadros said nothing. (Tr. 60). Prikas said he did not want to be in the car with Cuadros. Thus the men set out for Manhattan in separate cars. (Tr. 59-60). Valdes and Cuadros followed immediately behind Prikas. (Tr. 60).

Prikas, upon arriving at 300 East 74th Street, parked in a garage underneath the building. (Tr. 61). Valdes and Cuadros double-parked in the street. Valdes got out of his car, walked over, and handed Prikas a white plastic Regal Shoes shopping bag. (Tr. 62, 117, 170, 216; GX 1). Cuadros slid over to the driver's seat of Valdes' car. Valdes told Prikas that Cuadros was going to drive around the block. (Tr. 82, 121).

Valdes and Prikas entered 300 East 74th Street and took the elevator to Lubash's apartment, 26-F. (Tr. 62, 63, 141). The time, as noted by Special Agent Michael Gray who saw the men enter the building, was approximately 8:40 p.m. (Tr. 207-08). When Gray first saw Valdes and Prikas, Prikas was carrying the shopping bag. (Tr. 209).

In Lubash's apartment, Valdes and Prikas met Lubash and Edward J. Kelley, Jr., a DEA agent acting in an undercover capacity. Prikas gave the shopping bag to Valdes. Lubash asked if it contained the cocaine and Valdes said it did. (Tr. 63). Valdes removed a number of new shirts (GX 8) from the bag. Then Valdes removed a brown paper bag containing the pound of cocaine, which was packaged in two clear plastic bags. Lubash brought out his microscope and testing plate and checked the quality of the cocaine. (Tr. 64). Agent Kelley left the room several times on the pretext of calling his source of funds, who ostensibly was to supply \$18,000 for the purchase. (Tr. 201). In fact Kelley was communicating by phone with other agents on surveillance outside. (Tr. 151, 153-55, 157-58).

Agent Gray had maintained his surveillance position across Second Avenue from 300 East 74th Street after Valdes and Prikas entered the building. About five to ten minutes after they went into the building, Gray noticed Cuadros on the sidewalk on the corner of East 74th Street and Second Avenue, some 10 yards from 300 East 74th Street. (Tr. 209-10). Cuadros stood near the building for about 15 minutes. He was "looking about the area" and not moving more than four or five feet when he did occasionally move. (Tr. 210, 211).

After checking the cocaine, Lubash told Valdes and Prikas that he did not want to buy it because its quality was poor. (Tr. 64).^{*} Valdes repacked the cocaine, placed the shirts on top of it, and he and Prikas left the building, with Valdes carrying the cocaine. (Tr. 64, 66, 212). After apologizing to Valdes for the failure of the negotiations, Prikas went to the garage to claim his car.

^{*} Lubash's unfavorable assessment of the cocaine was a pretext. Laboratory analysis showed that the cocaine was 86% pure. (GX 11).

(Tr. 66-67, 212-13). Valdes rejoined Cuadros, who had returned to Valdes' car. (Tr. 67, 213-14).

After Valdes and Prikas had parted, Agent Gray drove east on 74th Street. Gray passed Valdes as he was entering a green Pontiac parked on the north side of 74th Street between Second and First Avenues. Cuadros was already in the car. (Tr. 213, 214). Gray continued several car-lengths beyond the Pontiac, then pulled over and waited. (Tr. 214). When Valdes pulled out of his parking space, Gray blocked the street with his car and other agents arrested Valdes and Cuadros. (Tr. 214). Just after Cuadros was removed from the passenger side of the Pontiac, Gray reached into the footwell on the passenger side and removed a white plastic shopping bag, which contained several new shirts and one pound of cocaine packaged in two separate clear plastic bags. (Tr. 215, 216). Two or three minutes after the Pontiac was stopped, the arresting agents left the scene in a Government car with Valdes and Cuadros in custody. (Tr. 218-19). Prikas, after taking about 10 minutes to reclaim his car in the garage, drove home unaware of the arrest. (Tr. 67, 69).

Agent Gray was assigned to drive the green Pontiac back to the DEA offices. (Tr. 219). As he stopped at a light during the trip, he looked into the console unit between the bucket seats and found a plastic pouch, or portfolio, containing a peddler's license issued to Cuadros by the New York City Department of Consumer Affairs and a Strauss Stores receipt issued to Cuadros for the purchase of two tires, as well as a loaded .38 calibre Colt Cobra revolver. (Tr. 281-88; GX 6, 6A, 6B, 7). The portfolio was wedged down and into the narrow console, and the weapon was on top of it. (Tr. 288-89).

On December 17, 1975, Cuadros was interviewed through an interpreter in the Office of the United States Attorney. After being duly advised of his constitutional

rights, Cuadros claimed that he had agreed to accompany Valdes to Manhattan not knowing the purpose of the trip. Cuadros acknowledged that he had left Valdes' car while it was parked in the vicinity of 300 East 74th Street, but claimed he had returned to the car immediately after completing a phone call to his wife. He said that he had not seen Valdes carry anything out of the car, nor had he noticed Valdes carrying anything back to the car. (Tr. 418-21).

Defendant's Case

Through his own testimony and that of his wife, Sylvana Cuadros, the defendant offered evidence of his gainful employment as an itinerant jewelry vendor. (Tr. 457-58, 503-07).

Cuadros and his wife testified that they had met with Valdes, at a house in Queens where Cuadros then lived, about one week before December 16, 1975. (Tr. 459, 508). Valdes said he was leaving for Colombia on December 17th and asked if anyone had any Christmas presents to send. (Tr. 460, 463). Cuadros and his wife told Valdes that they were going to send, not presents, but cards containing money. (Tr. 460). Valdes and Cuadros discussed Valdes' partnership with Cuadros' brother in a fast-food restaurant in Colombia. (Tr. 460-61). Valdes was unhappy about the partnership because it was unprofitable, and Cuadros expressed interest in taking over Valdes' share. (Tr. 509-10). Valdes gave Cuadros two watches from Bulova, on consignment. (Tr. 461).

On December 16, 1975, Valdes called the Cuadros residence at about 6:30 p.m. Rafael was not present. Valdes asked Sylvana Cuadros if she was sending the Christmas cards. She told him she was just finishing them. (Tr. 463). Valdes asked her to tell Cuadros to return the watches to him because he was leaving the next day. (Tr. 463).

When Rafael Cuadros arrived at home, at about 7:00 p.m., his wife told him about the call from Valdes. (Tr. 464, 511). Cuadros had dinner and then left for Valdes' apartment, taking the Christmas cards and the two watches, which he had been unable to sell, contained in his portfolio. (Tr. 465-66, 512-13). Cuadros arrived at Valdes' apartment at about 8:00 p.m. and gave the Christmas cards and watches to Valdes. Valdes put the cards into a suitcase. (Tr. 513). Cuadros told Valdes he wanted to speak with Valdes; Valdes said he was in a hurry, but if Cuadros wanted to talk he could come along. (Tr. 514). Cuadros did not know why Valdes was going to Manhattan. (Tr. 520). Cuadros got into Valdes' car and put his portfolio between the bucket seat and the console. (Tr. 519). On the way to Manhattan, Valdes and Cuadros discussed a sale of Valdes' interest in the Colombian restaurant to Cuadros. (Tr. 520). Upon arriving on East 74th Street, Valdes parked the car. (Tr. 520). Valdes got out and told Cuadros he would return. (Tr. 521). Ten or fifteen minutes later, Cuadros got out and called his wife from a pay phone in the middle of the block to tell her that he had accompanied Valdes to Manhattan. (Tr. 521-22, 467). Cuadros was out of the car a total of two minutes. (Tr. 523). Twenty to thirty minutes later, Valdes returned. Valdes was then carrying a shopping bag, which he placed in the footwell in front of Cuadros to clear the console area where the gearshift was located. (Tr. 524). As they drove off, Cuadros and Valdes were arrested. (Tr. 527).

Cuadros acknowledged that he had told an Assistant United States Attorney, the day after his arrest, that he had not seen the shopping bag when Valdes returned to the car. (Tr. 560). Cuadros sought to explain this falsehood by stating that he was not under oath at the time, had known that Valdes was charged with a narcotics offense, and had not wanted to incriminate Valdes. (Tr. 530, 531).

ARGUMENT

POINT I

Valdes' Statements to Prikas Were Properly Admitted as Declarations in Furtherance of the Conspiracy.

Cuadros' first claim is that the out-of-court declarations of Valdes to Prikas—identifying Cuadros as the source of the cocaine and the expectant recipient of a \$2,000 profit from its sale—should have been excluded because the evidence was insufficient to support a finding that Cuadros was a member of a conspiracy with Valdes and Prikas. The argument is untenable.

The legal principle authorizing receipt against Cuadros of the out-of-court declarations of Valdes made in furtherance of the conspiracy is venerable, see *Logan v. United States*, 144 U.S. 263, 308-09 (1892), and often-recognized, F.R. Evid. 801(d)(2)(E); *Lutwak v. United States*, 344 U.S. 604, 616-19 (1953); *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States v. Lam Lek Chong*, 544 F.2d 58, 64-65 (2d Cir. 1976); *United States v. Torres*, 519 F.2d 723, 725-26 (2d Cir.), cert. denied, 423 U.S. 1019 (1975); *United States v. Tramunti*, 513 F.2d 1087, 1108-09 (2d Cir.), cert. denied, 423 U.S. 832 (1975); 4 Wigmore, Evidence § 1079 (Chadbourn rev. 1972). Admission of such statements against a co-conspirator is "accepted practice," *United States v. Percevault*, 490 F.2d 126, 130 n.9 (2d Cir. 1974), if the trial judge finds that "the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances," *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied sub nom. *Lynch v. United*

States, 397 U.S. 1028 (1970); accord, *United States v. Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975), *cert. denied sub nom. James v. United States*, 423 U.S. 1058 (1976).^{*} The evidence in this case amply sustained the District Court's finding that the Government's proof had met the *Geaney* standard. (Tr. 440).

The Government's showing of an independent basis for the co-conspiratorial statements of Valdes began with direct evidence that Cuadros, "by his presence [with Valdes on December 16, 1975] was attempting to assist in the success of the operation," *United States v. Christophe*, 470 F.2d 865, 870 (2d Cir. 1972), *cert. denied sub nom. Pierro v. United States*, 411 U.S. 964 (1973). Prikas testified that when he met Valdes at 48th Street and Queens Boulevard, he asked Valdes why Cuadros had accompanied him to that location. Valdes replied that Cuadros was providing "protection." Cuadros, who had no hearing defects (Tr. 551) and was seated between the two speakers, remained silent. There was nothing ambiguous about the Valdes remark, see *United States v. Flecha*, 539 F.2d 874 (2d Cir. 1976), or Cuadros' silence after it was made, see *Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *United States v. Fantuzzi*, 463 F.2d 683, 690 (2d Cir. 1972); *United States v. LoBiondo*, 135 F.2d 130, 131-32 (2d Cir. 1943). In short, Cuadros was silent under circumstances "such that a dissent would in ordinary experience have been expressed if the communication had not been correct," 4 Wigmore, *Evidence* § 1071 (Chadbourn rev. 1972). Thus the Valdes remark was not

^{*} Appellant's claim, based on *Bruton v. United States*, 391 U.S. 123 (1968), that admission of the out-of-court statements violated the Sixth Amendment Confrontation Clause (Br. Point IV) is unfounded. The Government did not offer a post-arrest confession by a non-testifying co-defendant implicating Cuadros. Nor can it be contended that the exception to the hearsay rule embodied in F.R. Evid. 801(d)(2)(E) is unconstitutional. *Dutton v. Evans*, 400 U.S. 74, 80 (1970).

hearsay, as Cuadros claims (Br. 33), but an adoptive admission constituting independent evidence of a kind repeatedly recognized as furnishing proof *aliunde* of a defendant's participation in a conspiracy. *United States v. Wiley, supra*, 519 F.2d at 1350; *United States v. Geaney, supra*, 417 F.2d at 1120.*

Cuadros' actions later in the evening of December 16th provided additional evidence that his presence with Valdes on the night of a major cocaine transaction was not an unfortunate coincidence. When Cuadros and Valdes arrived in front of 300 East 74th Street, Cuadros moved to the driver's seat of Valdes' Pontiac and parked it while Valdes and Prikas went into 300 East 74th Street to negotiate with Lubash. After the car had been parked, Cuadros paced back and forth on the southeast corner of 74th Street and Second Avenue for some 15 minutes, although the night was cold (Tr. 522) and the car was nearby. From such conduct, the trial court could reasonably infer that Cuadros was concerned about the whereabouts and security of the valuable cocaine.

Furthermore, the demonstrable falsity of Cuadros' post-arrest version of the facts warranted rejection of an innocent interpretation of his activities on the evening of December 16th. Under questioning after the arrest, Cuadros denied having seen the shopping bag, which had been found in the middle of the footwell on the passenger side of the car, where he had been seated. (Tr. 361, 420-21). At trial, Cuadros acknowledged the

* Contrary to Cuadros' assertion (Br. 33), the Government was not required to call Valdes to prove the fact that the remark was made. Prikas, "a witness under oath, subject to cross-examination, and whose demeanor [could] be observed by the trier of fact," was "a reliable informant not only as to what he [had] seen but also as to what he [had] heard." *Dutton v. Evans, supra*, 409 U.S. at 88 (footnote omitted).

untruth of that claim and abandoned it. (Tr. 525). He continued to assert, however, that Valdes had not brought the shopping bag from Queens to Manhattan. (Tr. 516). The incredible implications of this portion of Cuadros' post-arrest statement and trial testimony provided evidence, not only that Cuadros was aware of the scheme, *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Lacey*, 459 F.2d 86, 89 (2d Cir. 1972), but that he was a participant in it as well, *United States v. Christophe*, *supra*, 470 F.2d at 870; *United States v. Geaney*, *supra*, 417 F.2d 1121.*

Finally, the inference of participation in the conspiracy to be drawn from all the foregoing evidence was reinforced by the location of the contraband and weapon seized shortly after the arrest. The trial court could properly take notice of the fact that Cuadros had virtual physical custody of the cocaine, located as it was in an area, under the dashboard, where a passenger in Cuadros' position would have put his feet. The weapon was present beside Cuadros in the console of the Pontiac, directly on top of what he acknowledged to be his portfolio.

In considering the claim that statements of a co-conspirator were erroneously admitted because of failure to satisfy the *Geaney* standard, the non-hearsay proof

* If Valdes did not transport the cocaine to Manhattan in his car, then Prikas was the courier. Cuadros could not dispute the fact that Valdes had the cocaine when the agents brought the conspiracy to a halt. Aside from the absence of anything in the record to explain why Prikas, if he had brought the cocaine, would transfer it to Valdes after the failure of the negotiations, it was Valdes who opened the shopping bag in Lubash's apartment (Tr. 63-64; *but see* Tr. 148) and repacked it after Lubash said he would not make the purchase. (Tr. 66, 159).

must be viewed in its entirety. *United States v. Lam Lek Chong, supra*, 544 F.2d at 65; *United States v. Torres, supra*, 519 F.2d at 726. In this case, the evidence was clearly sufficient for a finding, by a fair preponderance of the evidence, that Cuadros was a member of the conspiracy. Accordingly, Valdes' out-of-court declarations made in furtherance of the conspiracy outside of Cuadros' presence were properly admitted.

POINT II

There was Ample Evidence to Sustain the Jury's Finding of Guilt on Count Two.

Cuadros contends that the evidence was insufficient to sustain his conviction on Count Two. The contention is meritless.

The factual issues before the jury turned, not on the reasonableness of inferences to be drawn from undisputed evidence, but on the resolution of conflicting testimony. The testimony of Prikas and Gray, if credited, established beyond peradventure of a doubt that Cuadros had aided and abetted the possession and attempted distribution of one pound of cocaine on December 16, 1975. From Cuadros' silence after the Valdes remark, the jury could infer that Cuadros was present to provide protection for Valdes and the cocaine. The jury could find that Cuadros' portfolio had been located in the console with the gun, not outside the console, as Cuadros claimed, and that the gun was part of the "protection" that Cuadros was providing. The jury could conclude, in reliance on the out-of-court statements of Valdes, that Cuadros was supplying cocaine and stood to gain \$2,000 from its sale, *United States v. Torres*, 519 F.2d 723, 726 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States v. Tramunti*, 513 F.2d 1087, 1109 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), *cert.*

denied sub nom. *Lynch v. United States*, 397 U.S. 1028 (1970).

Moreover, Cuadros took the stand, see *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974); *United States v. Arcuri*, 405 F.2d 691, 695 n. 7 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969). Therefore the jury could consider the extreme improbability of portions of Cuadros' testimony, discussed in Point I, *supra*, as evidence that his modification of his story at trial did not reflect any intention to tell the truth, but was merely an effort to enhance the surface plausibility of a false tale by eliminating one of its more blatant untruths. Cuadros' false testimony, if found to be such, was a matter from which the jury could infer that the truth would not have aided the defense. *United States v. Geaney, supra*, 417 F.2d at 1121.

Faced with a multitude of factual conflicts,* the jury performed its time-honored function of weighing credibility. It disbelieved the defendant and credited the testimony of Prikas and Gray. That testimony, viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), was such that a reasonable mind might fairly conclude that Cuadros was

* Cuadros' point-by-point denial of his guilt stood in stark contrast to the other trial evidence. According to Cuadros, he did not have a gun on the evening of December 16, 1975 and had never owned one. (Tr. 520). He did not open or look into the console. (Tr. 520). Valdes did not carry a shopping bag when he entered the car in Queens. (Tr. 516). Except for traffic lights, he and Valdes did not stop on the way to Manhattan. (Tr. 518). Valdes did not speak to Prikas in his presence. (Tr. 519). He did not see Prikas at all on December 16, 1975. (Tr. 519). He did not drive Valdes' car on the evening of the arrest. (Tr. 520). He did not linger in front of 300 East 74th Street. (Tr. 523).

guilty beyond a reasonable doubt on Count Two. *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977). The jury's verdict should therefore be sustained.

POINT III

The Revolver Was Properly Admitted Into Evidence.

Cuadros argues that the District Court erred in admitting into evidence the revolver that Agent Gray found in the console of the Pontiac used by Valdes and Cuadros for the trip from Queens to Manhattan. The claim is meritless.

The contention that the revolver was improperly admitted must be evaluated in light of the principles set forth in Article IV of the Federal Rules of Evidence. Article IV of the Rules defines "relevant evidence" as evidence tending to make the existence of a pertinent fact more, or less, probable (Rule 401), and provides that all relevant evidence is admissible (Rule 402), unless its probative value is "substantially outweighed" by the danger of "unfair prejudice" or confusion of the issues (Rule 403). Decisions in which this Court has considered the propriety of admitting weapons into evidence illustrate the application of the principles of Article IV and provide the standard by which Judge Cooper's exercise of discretion must be tested. *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3810-12 (2d Cir. May 25, 1977); *United States v. Robinson*, 544 F.2d 611 (2d Cir. 1976), petition for rehearing *en banc* granted, February 17, 1977;* *United States v.*

* In *Robinson*, admission of a revolver found in the possession of a defendant charged with armed bank robbery upon his arrest, ten weeks after the offense, was held erroneous. We continue to believe, for reasons stated in our petition for re-

[Footnote continued on following page]

Wiener, 534 F.2d 15 (2d Cir.), *cert. denied*, 429 U.S. 820 (1976); *United States v. Campanile*, 516 F.2d 288 (2d Cir. 1975); *United States v. Fisher*, 455 F.2d 1101 (2d Cir. 1972); *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). Since a balancing process is involved, the decision to admit the weapon in this case ought not to be overturned unless either 1) its probative value is found to have been less than that of the firearms held properly admitted in all of the foregoing authorities (with the exception of *Robinson*), or 2) its potential for unfair prejudicial impact is found to have been substantially greater. Analysis of the two determinative factors in this case reveals that here, if ever, the balance fell decisively in favor of admitting the gun.

The discovery of the revolver was unquestionably relevant to the issues before the jury. Prikas' testimony about his encounter with Valdes and Cuadros in Queens before the final meeting with Lubash, at which Valdes remarked that Cuadros was providing protection in connection with the deal, was one of the most vigorously disputed issues on which the jury was asked to pass. Cuadros emphatically denied that any such meeting had taken place and insisted that he and Valdes had driven directly to Manhattan from Queens. (Tr. 516, 519). In evaluating the diametrically opposed testimony of Prikas and Cuadros, the jury was entitled to be informed that a gun had been found in the console of Valdes' car, between Valdes and Cuadros as they sat in the car and on

hearing and our brief submitted to the *en banc* Court upon rehearing, that *Robinson* was incorrectly decided. The petition for rehearing is *sub judice*.

In any event, the result in this case would be unaffected by even the panel's decision in *Robinson*. The weapon admitted in this case was recovered from the scene of the crime on the very day of the narcotics transaction. Thus, this case does not even arguably present any possible questions of remoteness, such as the ones that troubled the majority of the panel in *Robinson*.

top of Cuadros' portfolio.* The weapon constituted evidence that precautions had been taken by at least one of the occupants of the Valdes car to protect the cocaine and the \$18,000 in cash to be received for it. The proximity of the gun to Cuadros' portfolio, moreover, permitted the inference that Cuadros had possession of the gun and was indeed providing protection as Valdes had said. The revolver therefore corroborated the sharply-converted testimony of Prikas and shed considerable light on Cuadros' knowledge and intent. *United States v. Fisher, supra*, 455 F.2d at 1103-04; *cf. United States v. Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States v. Bradwell*, 388 F.2d 619 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States v. Johnson*, 382 F.2d 280 (2d Cir. 1967); *United States v. Frascione*, 299 F.2d 824 (2d Cir.), *cert. denied*, 370 U.S. 910 (1962).

The probative value of the revolver—enhanced by its closeness in time and place to the cocaine forming the basis of Count Two, see *United States v. Wiener, supra* (gun found in sack with hashish)—was, we submit, substantially greater than the probative value of weapons

* Cuadros was not prejudiced by the failure of the Government to provide a supplemental bill of particulars (listing the portfolio and its contents) until shortly before trial. (Br. 34). He acknowledged on the stand that the portfolio was his. (Tr. 512). The significance of the portfolio derived from its placement under the weapon in the console, a matter not covered by the relevant item of Cuadros' demand for a bill of particulars, which sought:

"(e) The property of every nature and description taken from each of the defendants or from persons originally arrested with the defendants pursuant to their arrest."

The trial court offered a continuance to cure any possible prejudice stemming from the tardiness of the Government's supplemental bill. (Tr. 273). No request for a continuance was made.

in other cases where admission of such evidence has been upheld. *United States v. Campanile, supra* (defendant charged with unarmed robberies of Vermont banks; weapon seized three months later in New Jersey, properly admitted); *United States v. Ravich, supra* (three pistols and a sawed-off shotgun used in Long Island City bank robbery; six pistols seized in Baton Rouge six weeks later, properly admitted). Nor is there any reason to believe that the potential for unfair prejudice, if any, attendant upon admission of the weapon exceeded that arising from the admission of firearms in other cases. The loaded .38 calibre revolver found by Gray was no more inflammatory than the loaded gun in *Wiener*, the Luger in *Campanile*, or the six .38 calibre revolvers in *Ravich*, three of which could not have been used in the offense. The fact that the revolver was found on the very night of the attempted cocaine transaction minimized the possibility that the attention of the jury would be diverted from the issues in the case and convict Cuadros on the basis of speculation as to his bad character.

Under such circumstances, it cannot be held that Judge Cooper abused the "wide discretion" with which he was vested, *United States v. Ravich, supra*, 421 F.2d at 1205, or that this case presents one of the "rare," *United States v. Fisher, supra*, 455 F.2d 1104, occasions on which the exercise of that discretion must be overturned.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ALLEN R. BENTLEY,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York)

ALLEN R. BENTLEY, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 8TH day of JULY, 1977
he served a copy of the within BRIEF
by placing ^{two copies of} the same in a properly postpaid franked
envelope addressed:

FREDRIC LEWIS, ESQ.
36 VESEY STREET
11TH FLOOR
NEW YORK, NEW YORK 10007

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing in the United States Courthouse, ^{ANNEX} Foley
Square, Borough of Manhattan, City of New York.

Allen R. Bentley

Sworn to before me this

8TH day of JULY 1977

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979